SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 569.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Reply Brief of Appellant on Motion for Diminution of Record and for Writ of Certiorari.

1. Counsel for appellee makes the objection to the first suggestion of diminution of the record in the above-entitled cause that the appellant failed to pursue his remedy in the Court of Claims by moving to have the findings amended.

The record in this case clearly shows that the claimant in the court below did make a motion to amend the findings to include the documents suggested in this motion and the court failed to include the facts in the finding (40 Ct. Cls., pp. 172 and 186).

So that it clearly appears that this motion is not made too late, as claimant had exhausted his remedy in the court below (U. S. *vs.* Adams, 9 Wall., 554).

Counsel for appellee, in his brief, on page 2, states that—

"If the Court of Claims had failed to find upon the subject-matter involved herein it might then be competent to require the evidence constituting the exhibits indicated to

be certified to this court in order to complete the record, but inasmuch as the Court of Claims made a clear, positive, and unequivocal finding, showing the form and character of the order of approval granted by the trial court which approved the accounts in question, it is not possible to now attack the veracity of that finding in this court."

The answer to this objection is conclusive upon examination of the finding of the court below, wherein the court found *as a matter of fact* that "the court declined to make the *usual order of approval*" (40 Ct. Cls., 172).

This finding of the court is a mixed question of law and fact, and an examination should be made of the orders of approval of the accounts of claimant and other court officers on file in the court below by this court to determine as a matter of fact as to whether the order set out in the finding of the court below is an *unusual* order. It will thus be seen that the finding of the court below is misleading and deprives the appellant of the material facts requested by him and not objected to by counsel for the defendant in the court below, so that this court can determine the essential fact and legal interpretation of the character of said order of approval.

The question is material to the appellant in order that he may have the benefit of the action of the court in approving his accounts as interpreted by this court in the cases of U. S. *vs.* Jones, 134 U. S., 483, and U. S. *vs.* Nix, 189 U. S., 775.

This motion is therefore not in conflict with rule 14 of this court.

2. In this motion the appellant asks this court to require the Court of Claims to include in its finding simply the records and reports on file and not objected to by counsel for the defendant below, so that this court can determine from the reports of the various officers who examined the accounts of claimant as to whether the accounting officers allowed the accounts of claimant *by mistake* and in pursu-

ance of the then practice of the accounting officers to allow detail fees in proceedings of that character.

These records and reports are *official documents* which speak for themselves, and are material evidence for appellant.

It is very material in the determination of this case that this court should have these documents in order to determine for itself what the practice of the Department was at that time and whether a legal inference could be drawn from said examination that the accounting officers did pay these accounts *by mistake* and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character.

Without all the essential, material. and undisputed facts in the court below this court cannot determine from the meager finding of the Court of Claims the all-important question of *mistake*, which may be one of fact as well as of law, and to determine the practice of the accounting officers.

It will thus be seen that there exists a material deficiency not only in the record, but on the face of the record, which can only be corrected by the granting of this motion (Elmore *vs.* Grymes, 1st Pet., 469).

Respectfully submitted.

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